IN THE HIGH COURT OF MADHYA PRADESH AT JABALPUR

BEFORE

HON'BLE SHRI JUSTICE DEEPAK KHOT

ON THE 13th OF JULY, 2026

ARBITRATION CASE No. 40 of 2025

M/S RAKESH KUMAR JAIN

Versus

UNION OF INDIA AND OTHERS

Appearance:

Shri Atul Choudhari - Advocate for the applicant.

Ms. Priti Singh- Advocate for the respondents

ORDER

The present application has been filed by the applicant under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act of 1996' for the sake of brevity) for appointment of an arbitrator to resolve the dispute arose between the parties pursuant to an agreement dated 30.05.2019 (Annexure A/1).

2. It is submitted by the counsel for the applicant that pursuant to the Notice Inviting Tender (NIT) floated by the respondents for the work of Construction of 02 Nos. Limited Height Subway (LHS) in lieu of LC No. 373 at Km. 1127/3-4 and LC No. 379 at Km. 1147/7-8 between Maihar–Unchehara on the Jabalpur–Manikpur Section, the applicant participated in the tender process and, upon being declared the successful bidder, was issued a Letter of Acceptance (LOA) dated 30.05.2019. In compliance with the terms of the contract, the applicant duly furnished the requisite Performance

Bank Guarantee and immediately mobilized its manpower, machinery, and other resources to the work site but the applicant was not given ready and clear work site on time. According to the applicant, the work involved construction of precast reinforced concrete boxes, for which the General Agreement Drawing (GAD), detailed drawings and structural designs were indispensable for execution of the work but neither the GAD nor the requisite drawings and designs formed part of the tender documents nor were supplied to the applicant at the time of execution of the agreement. Despite repeated requests, the respondents supplied the requisite drawings only in October, 2019, i.e., nearly four months after the issuance of the LOA. Even thereafter, the respondents effected substantial changes in the drawings and specifications, including alterations in the dimensions, specifications, and quantity of concrete required for the precast boxes, resulting in further delay and disruption in the execution of the work.

3. Learned counsel for the applicant further submits that the respondents also failed to hand over the actual work site in a clear and obstruction-free condition, thereby causing further hindrances and complications in the execution of the contract. Owing to the delays solely attributable to the respondents, the applicant was constrained to seek extension of the contractual period. The respondents, acknowledging the existence of such delays, granted extensions of time on more than three occasions under Clause 17(A) of the General Conditions of Contract (GCC). However, despite granting such extensions on account of circumstances beyond the control of the applicant, the respondents failed to extend the

benefit of the Price Variation Clause (PVC). It is further submitted that during the extended period of execution, the unprecedented COVID-19 pandemic led to an extraordinary escalation in the prices of essential construction materials. Consequently, the contract, which was originally envisaged to be completed within ten months from the date of the LOA, was completed only after considerable delay occasioned by factors entirely attributable to the respondents and circumstances beyond the control of the applicant. In these circumstances, the applicant, through various representations and letters addressed to the respondents from time to time, requested that the benefit of the Price Variation Clause (PVC) be extended for reimbursement of the increased cost incurred during the extended period of the contract. Despite repeated requests and representations, the respondents failed to consider or grant the legitimate benefit of PVC, thereby causing severe financial prejudice and loss to the applicant. The applicant has also sought a refund of Rs. 2.5 lakhs, which was unreasonably deducted by the respondents from the running bills on account of cable cuts for which the applicant was not responsible. As such the completion of the contract got delayed by more than 1 year and 5 months from the original period of completion, as a result of which the applicant has suffered a loss of business opportunities, quantified at Rs.81,81,346.65. The applicant has also sought interest on the claimed amount but the respondents have failed and neglected to pay the outstanding dues to the applicant. The applicant, therefore, invoked the arbitration clause vide letter dated 10.09.2024 (Annexure A-2) and requested for appointment of an independent Arbitrator but till-date nothing has been heard of from the side of the respondents.

4. Heard learned counsel for the parties and perused the record.

5. It has been submitted that the claim raised by the applicant has been found to be covered under the excepted matters, therefore, on notice invoking arbitration vide notice dated 10.09.2024 (Annexure A/2) under Clause 64 of the GCC and Section 21 of the Arbitration and Conciliation Act, 1996, the respondent-Railway has responded through communication dated 14.11.2024 (annexure A/3) stating that the termination of the Contract under Clause 62 of the GCC falls within the "excepted matter" under Clause 63.1 of the GCC, therefore, it is not arbitrable. However, the question in regard to whether the matter falls within the excepted matter or not it is not the domain of the High Court to decide as it contains disputed question of facts, which is to be determined by the Arbitrator. Any question which goes to the root of the matter including the jurisdiction and limitation is always to be determined by the Arbitrator in view of the law laid down by the Hon'ble Apex Court in the case of **Uttarakhand Purv Sainik Kalyan Nigam Ltd. v. Northern Coal Field Ltd., (2020) 2 SCC 455** and in the case of **Aslam Ismail Khan Deshmukh v. ASAP Fluids (P) Ltd., (2025) 1 SCC 502.**

6. The Hon. Apex Court in the case of **Uttarakhand Purv Sainik Kalyan Nigam Ltd. (supra)**, while over-ruling the order of this Court in the case of Uttarakhand Purv Sainik Kalyan Nigam Limited Vs. Northern Coalfield Limited, 2018 (4) MPLJ 45, has held that after the amendment in the Act of 1996, section 6A has been inserted which provides that all the questions in regard to jurisdiction, limitation or which goes to the root shall

be decided by the Arbitrator and those are not to be decided by this Court at the referral stage. For ready reference the principle laid down in Para 7 is reproduced here and below :-

> "7. We have heard the learned counsel for the parties and perused the pleadings.
> 7.1. Section 21 of the 1996 Act provides that arbitral proceedings commence on the date on which a request for disputes to be referred to arbitration is received by the respondent.
> 7.2. In the present case, the notice of arbitration was issued by the petitioner Contractor to the respondent Company on 9-3-2016. The invocation took place after Section 11 was amended by the 2015 Amendment Act, which came into force on 23-10-2015, the amended provision would be applicable to the present case.
> 7.3. The 2015 Amendment Act brought about a significant change in the appointment process under Section 11: first, the default power of appointment shifted from the Chief Justice of the High Court in arbitrations governed by Part I of the Act, to the High Court; second, the scope of jurisdiction under sub-section (6-A) of Section 11 was confined to the examination of the existence of the arbitration agreement at the pre-reference stage.
> 7.4. Prior to the coming into force of the 2015 Amendment Act, much controversy had surrounded the nature of the power of appointment by the Chief Justice, or his designate under Section 11. A seven-Judge Constitution Bench of this Court in SBP & Co. v. Patel Engg. Ltd. [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] defined the scope of power of the Chief Justice under Section 11. The Court held that the scope of power exercised under Section 11 was to first decide:
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> (i) whether there was a valid arbitration agreement; and
> (ii) whether the person who has made the request under Section 11, was a party to the arbitration agreement; and
> (iii) whether the party making the motion had approached the appropriate High Court.
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> 7.5. Further, the Chief Justice was required to decide all threshold issues with respect to jurisdiction, the existence of the agreement, whether the claim was a dead one; or a time-barred claim sought to be resurrected; or whether the parties had concluded the transaction by recording satisfaction of their mutual rights and obligations, and received the final payment without objection, under Section 11, at the pre-reference stage. The decision in Patel Engg. [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] was followed by this Court in Boghara Polyfab [National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117] , Master Construction [Union of India v. Master Construction Co., (2011) 12 SCC 349 : (2012) 2 SCC (Civ) 582] , and other decisions.
> 7.6. The Law Commission in the 246th Report [Amendments to the Arbitration and Conciliation Act, 1996, Report No. 246, Law

Commission of India (August 2014), p. 20.] recommended that:

> "33. … the Commission has recommended amendments to Sections 8 and 11 of the Arbitration and Conciliation Act, 1996. The scope of the judicial intervention is only restricted to situations where the court/judicial authority finds that the arbitration agreement does not exist or is null and void. Insofar as the [Ed.: The matter between two asterisks has been emphasised in original.] nature [Ed.: The matter between two asterisks has been emphasised in original.] of intervention is concerned, it is recommended that in the event the court/judicial authority is prima facie satisfied against the argument challenging the arbitration agreement, it shall appoint the arbitrator and/or refer the parties to arbitration, as the case may be. The amendment envisages that the judicial authority shall not refer the parties to arbitration only if it finds that there does not exist an arbitration agreement or that it is null and void. If the judicial authority is of the opinion that prima facie the arbitration agreement exists, then it shall refer the dispute to arbitration, and leave the existence of the arbitration agreement to be finally determined by the Arbitral Tribunal."

(emphasis supplied)

7.7. Based on the recommendations of the Law Commission, Section 11 was substantially amended by the 2015 Amendment Act, to overcome the effect of all previous judgments rendered on the scope of power by a non obstante clause, and to reinforce the kompetenz-kompetenz principle enshrined in Section 16 of the 1996 Act. The 2015 Amendment Act inserted sub-section (6-A) to Section 11 which provides that:

"(6-A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any court, confine to the examination of the existence of an arbitration agreement."

(emphasis supplied)

7.8. By virtue of the non obstante clause incorporated in Section 11(6-A), previous judgments rendered in Patel Engg. [SBP & Co. v. Patel Engg. Ltd., (2005) 8 SCC 618] and Boghara Polyfab [National Insurance Co. Ltd. v. Boghara Polyfab (P) Ltd., (2009) 1 SCC 267 : (2009) 1 SCC (Civ) 117] , were legislatively overruled. The scope of examination is now confined only to the existence of the arbitration agreement at the Section 11 stage, and nothing more.

7.9. Reliance is placed on the judgment in Duro Felguera S.A. v. Gangavaram Port Ltd. [Duro Felguera S.A. v. Gangavaram Port Ltd., (2017) 9 SCC 729 : (2017) 4 SCC (Civ) 764. Refer to TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] , wherein this Court held that: (SCC p. 759, para 48)

"48. … From a reading of Section 11(6-A), the intention of the legislature is crystal clear i.e. the court should and need only look into one aspect—the existence of an arbitration agreement. What are the factors for deciding as to whether there is an arbitration agreement is the next question. The resolution to that is simple — it needs to be seen if the agreement contains a clause which provides for arbitration pertaining to the disputes which have arisen between the parties to the agreement."

(emphasis supplied)

7.10. In view of the legislative mandate contained in Section 11(6-A), the Court is now required only to examine the existence of the arbitration agreement. All other preliminary or threshold issues are left to be decided by the arbitrator under Section 16, which enshrines the kompetenz-kompetenz principle.

7.11. The doctrine of "kompetenz-kompetenz", also referred to as "compétence-compétence", or "compétence de la recognized", implies that the Arbitral Tribunal is empowered and has the competence to rule on its own jurisdiction, including determining all jurisdictional issues, and the existence or validity of the arbitration agreement. This doctrine is intended to minimise judicial intervention, so that the arbitral process is not thwarted at the threshold, when a preliminary objection is raised by one of the parties. The doctrine of kompetenz-kompetenz is, however, subject to the exception i.e. when the arbitration agreement itself is impeached as being procured by fraud or deception. This exception would also apply to cases where the parties in the process of negotiation, may have entered into a draft agreement as an antecedent step prior to executing the final contract. The draft agreement would be a mere proposal to arbitrate, and not an unequivocal acceptance of the terms of the agreement. Section 7 of the Contract Act, 1872 requires the acceptance of a contract to be absolute and unqualified [*Dresser Rand S.A.* v. *Bindal Agro Chem Ltd.*, (2006) 1 SCC 751. See also *BSNL* v. *Telephone Cables Ltd.*, (2010) 5 SCC 213 : (2010) 2 SCC (Civ) 352. Refer to *PSA Mumbai Investments Pte. Ltd.* v. *Jawaharlal Nehru Port Trust*, (2018) 10 SCC 525 : (2019) 1 SCC (Civ) 1] . If an arbitration agreement is not valid or non-existent, the Arbitral Tribunal cannot assume jurisdiction to adjudicate upon the disputes. Appointment of an arbitrator may be refused if the arbitration agreement is not in writing, or the disputes are beyond the scope of the arbitration agreement. Article V(1)(*a*) of the New York Convention states that recognition and enforcement of an award may be refused if the arbitration agreement "is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made".

7.12. The legislative intent underlying the 1996 Act is party autonomy and minimal judicial intervention in the arbitral process. Under this regime, once the arbitrator is appointed, or the tribunal is constituted, all issues and objections are to be decided by the Arbitral Tribunal.

7.13. In view of the provisions of Section 16, and the legislative policy to restrict judicial intervention at the pre-reference stage, the issue of limitation would require to be decided by the arbitrator. Sub-section (1) of Section 16 provides that the Arbitral Tribunal may rule on its own jurisdiction, "*including any* objections" with respect to the existence or validity of the arbitration agreement. Section 16 is as an inclusive provision, which would comprehend all preliminary issues touching upon the jurisdiction of the Arbitral Tribunal. The issue of limitation is a jurisdictional issue, which would be required to be decided by the arbitrator under Section 16, and not the High Court at the pre-reference stage under Section 11 of the Act. Once the existence of the arbitration agreement is not disputed, all issues, including jurisdictional objections are to be decided by the arbitrator.

7.14. In the present case, the issue of limitation was raised by the respondent Company to oppose the appointment of the arbitrator under Section 11 before the High Court. Limitation is a mixed question of fact and law. In *ITW Signode (India) Ltd.* v. *CCE* [*ITW Signode (India) Ltd.* v. *CCE*, (2004) 3 SCC 48] a three-Judge Bench of this Court held that the question of limitation involves a question of jurisdiction. The findings on the issue of limitation would be a jurisdictional issue. Such a jurisdictional issue is to be determined having regard to the facts and the law. Reliance is also placed on the judgment of this Court i n *NTPC Ltd.* v. *Siemens Atkeingesellschaft* [*NTPC Ltd.* v. *Siemens Atkeingesellschaft*, (2007) 4 SCC 451] , wherein it was held that the Arbitral Tribunal would deal with limitation under Section 16 of the 1996 Act. If the tribunal finds that the claim is a dead one, or that the claim was barred by limitation, the adjudication of these issues would be on the merits of the claim. Under sub-section (5) of Section 16, the tribunal has the obligation to decide the plea; and if it rejects the plea, the arbitral proceedings would continue, and the tribunal would make the award. Under sub-section (6) a party aggrieved by such an arbitral award may challenge the award under Section 34. In *Iffco Ltd.* v. *Bhadra Products* [*Iffco Ltd.* v. *Bhadra Products*, (2018) 2 SCC 534 : (2018) 2 SCC (Civ) 208] this Court held that the issue of limitation being a jurisdictional issue, the same has to be decided by the tribunal under Section 16, which is based on Article 16 of the Uncitral Model Law which enshrines the kompetenz principle.

7. This view has also been taken by the Larger Bench of the Hon'ble Apex Court in the case of **Central Organisation for Railway Electrification v. ECI SPIC SMO MCML (JV), (2025) 4 SCC 641,** wherein it is held that at the stage of deciding an application for appointment of an Arbitrator, the Court must not conduct an intricate enquiry into the matter, where the claim raised by the applicant is time barred and should be left open for

determination by the Arbitrator. Such an approach gives true meaning to the view taken in the case of **Interplay Between Arbitration Agreements under Arbitration, 1996 & Stamp Act, 1899, In re, (2024) 6 SCC 1**.

8 . The Hon'ble Apex court in the case of **Aslam Ismail Khan Deshmukh (supra)** has held as under :-

> **50.** As evident from the aforesaid discussion and especially in light of the observations made in *Krish Spg.* [*SBI General Insurance Co. Ltd.* v. *Krish Spg.*, (2024) 12 SCC 1 : 2024 SCC OnLine SC 1754] , this Court cannot conduct an intricate evidentiary enquiry into the question of when the cause of action can be said to have arisen between the parties and whether the claim raised by the petitioner is time-barred. This has to be strictly left for the determination by the Arbitral Tribunal. All other submissions made by the parties regarding the entitlement of the petitioner to 4,00,000 and 2,00,010 equity shares in Respondent 1 company are concerned with the merits of the dispute which squarely falls within the domain of the Arbitral Tribunal.
> **51.** It is now well-settled law that, at the stage of Section 11 application, the referral Courts need only to examine whether the arbitration agreement exists — nothing more, nothing less. This approach upholds the intention of the parties, at the time of entering into the agreement, to refer all disputes arising between themselves to arbitration. However, some parties might take undue advantage of such a limited scope of judicial interference of the referral Courts and force other parties to the agreement into participating in a time-consuming and costly arbitration process....
> **52.** In order to balance such a limited scope of judicial interference with the interests of the parties who might be constrained to participate in the arbitration proceedings, the Arbitral Tribunal may direct that the costs of the arbitration shall be borne by the party which the Tribunal ultimately finds to have abused the process of law and caused unnecessary harassment to the other party to the arbitration.
> **53.** The existence of the arbitration agreement as contained in Clause 13.10 of the shareholders' agreement is not disputed by either of the parties. The submissions as regards the claim of the petitioner being ex facie time-barred may be adjudicated upon by the Arbitral Tribunal as a preliminary issue.

54. In view of the aforesaid, the present petitions are allowed. Taking into consideration the fact that an Arbitral Tribunal comprising of a sole arbitrator, Mr Mayur Khandeparkar (Advocate, High Court of Judicature at Bombay) has already been constituted for the adjudication of disputes between the same parties in relation to the service agreement dated 18-10-2011, it would be desirable to constitute an Arbitral Tribunal comprising of the same sole arbitrator for adjudication of the present disputes pertaining to the shareholders' agreement dated 25-7-2011. The fees of the arbitrator including other modalities shall be fixed in consultation with the parties.

55. In the facts of the present case, it would be apposite to observe that, in the event the Arbitral Tribunal ultimately finds the present claims of the petitioner to be time-barred, it may direct that the costs of the arbitration pertaining to these claims be borne solely by the petitioner herein.

56. It is made clear that all the other rights and contentions of the parties are left open for adjudication by the learned arbitrator.

9. Considering the fact that there exists arbitration clause and the dispute still exits between the parties and that the question of jurisdiction of arbitrator to arbitrate on account of matter having been 'excepted matter' is always open to be agitated before the arbitrator in view of the law laid down by the Hon'ble Apex Court in the cases referred hereinabove, this application is allowed.

10. Considering the list of empanelled Arbitrators issued by the M.P. Arbitration Centre, Jabalpur, following order is passed:-

(i) ***Mrs. Meena Bhatt, Retd. District & Sessions Judge, Address- Flat No. -1308, 3rd Floor, Tower-I, Krishna Heights, Gwarighat Road, Jabalpur, Contact No. 94246-69722, Email- meenabhatt18547@gmail.com,*** *who has given her consent under Section 11(8) of the Arbitration and Conciliation Act, 1996, is appointed as sole Arbitrator to resolve the dispute between the parties in the case..*

(ii) Arbitrator shall issue the notices and fix the date and suitable venue for arbitration. Said arbitration will take place at Jabalpur.

(iii) Parties are directed to deposit necessary charges and fees as per M.P. Arbitration Center (Domestic and International) Rule, 2019.

(iv) Director of Madhya Pradesh Arbitration Centre, Domestic and International, Jabalpur (M.P.D.I.A.C.) shall communicate the decision of this Court to the Sole Arbitrator.

(v) Other provisions of Section 15(3)(4) of the Arbitration and Conciliation Act, 1996 will apply to substitute Arbitrator.

11. With the aforesaid directions, the Arbitration Case is disposed of.

(DEEPAK KHOT)
JUDGE

L.R.